

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF THE PROPOSED)
TITLE V STATE OPERATING PERMIT NO. 07OPEP300)
PERMIT ISSUANCE FOR)
)
SCHRIEVER AIR FORCE BASE (AFB))
COLORADO SPRINGS, CO)
)
ISSUED BY COLORADO DEPARTMENT)
OF PUBLIC HEALTH AND ENVIRONMENT)
)

PETITION TO THE EPA ADMINISTRATOR TO OBJECT TO ISSUANCE OF THE
PROPOSED TITLE V OPERATING PERMIT
FOR SCHRIEVER AIR FORCE BASE

Pursuant to Section 505 of the Clean Air Act (CAA), Schriever Air Force Base (Schriever) hereby petitions the Administrator of the United States Environmental Protection Agency (EPA) to object to the proposed initial permit for Title V Operating Permit number 07OPEP300 (Attachment 1) issued by the Air Pollution Control Division (APCD), a division of the Colorado Department of Public Health & Environment (CDPHE). The CAA mandates that the Administrator “shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance” with CAA requirements. 42 USC § 7661d(b)(2). The CAA also requires the EPA to grant or deny any such petition within sixty days of its filing. Id.

As discussed below, the Schriever permit does not comply with the CAA; therefore, the EPA Administrator must object to it. Specifically, in its draft final version of the permit, APCD arbitrarily imposes restrictions on Schriever’s ability to assert the defenses of malfunction and emergency, fails to exercise exemptions for emergency events, prohibits Schriever from using EPA-approved methods for opacity observations, and includes a requirement for the payment of late fees that the federal government legally cannot pay. Schriever timely raised these objections through submission of written comments and testimony at a public hearing on 8 April 2020 and 3 June 2020, respectively. See Attachment 2. This petition also responds to APCD’s response to Schriever’s comments, which were provided to Schriever on 15 December 2020. See Attachment 3. EPA’s 45-day review period for the permit began on 15 December 2020 and ended on 29 January 2021. The 60-day public petition period began on 29 January 2021 and ends on 30 March 2021. Therefore, this petition is timely.

I. FACTS

A. Schriever AFB's No-Fail Mission Requirements

Schriever AFB is a federal military installation that is home to more than 20 units executing a variety of space based missions for the nation's defense. Schriever has a "no fail" mission to command and control the Global Positioning System (GPS) satellite constellation that impacts billions of civilian and military users around the world. Schriever's national space-based capabilities allow military leaders to see the battlespace with clarity, provide early warning, strike with precision, navigate with accuracy, communicate with certainty, understand weather impacts, and operate anywhere in the world.

Schriever must be in a state of constant readiness, able to execute its critical mission regardless of local, regional, national and global incidents. The installation's emergency generators are a critical component of its planning and mission support as they provide the flexibility to offer primary power through on-site generators during a malfunction or emergency event. The redundancy available through emergency power is critical to ensuring continuity of operations for military missions and civilian support capabilities. The COVID-19 pandemic reminds us how fragile systems and manpower can be during unavoidable events that may require emergency operations for longer than originally anticipated.

B. Air Force Engagement with APCD on Operating Permit 07OPEP300

The Air Force Civil Engineering Center (AFCEC) has been engaged with APCD on permit 07OPEP300 for over ten years. In December 2007, Schriever submitted its application for an operating permit. Ten years later, in December 2017, APCD issued the first draft of permit 07OPEP300. In February 2018, Schriever provided comments on the draft permit and proposed APCD implement a permit shield clause that would limit Schriever's liability in the event of an emergency-triggered permit limit exceedance. APCD declined to do so. Since 2018, Schriever has attempted to actively work with APCD to find a solution for the issue of emergency-triggered permit limit exceedances. Finding this solution is especially important given Schriever's critical no-fail mission as described above. As written, the draft permit imposes operational limits on emergency events while simultaneously limiting affirmative defenses during emergency and malfunction events. During a crisis, the installation must be able to continue operations unencumbered, without fear of reprisal at a time when emergency power is mission essential.

On 3 June 2020, Schriever AFB attended a hearing and provided Air Quality Control Commission (AQCC) with public testimony and written comments on the draft permit. See Attachment 2. In addition to the hearing, Schriever requested APCD provide a written response to Schriever's comments. APCD provided those comments on 15 December 2020. See Attachment 3.

II. APCD Arbitrarily Limits the Affirmative Defense Provision for Emissions During Malfunctions

The exemption of emissions resulting from malfunctions is well within state and federal law. Nonetheless, APCD limited Schriever's ability to invoke the malfunction defense in its draft permit. Specifically, Under Section IV, Common Provision Condition 3(d)(x), page 36, the draft permit limits the affirmative defense of malfunction, rendering it effective only in the event "no exceedances of the relevant ambient air quality standards established in the Commission's Regulations could be attributed to the emitting source." This permit condition also states, "the affirmative defense provision does not apply to state implementation plan (SIP) limits or permit limits that have been set taking into account potential emission during malfunctions..."

The language of the draft permit is inconsistent with 42 USC § 7413, which authorizes states to allow the affirmative defense of malfunction, so long as the defense is narrowly tailored to address unavoidable, excess emissions, consistent with 42 USC § 7413(e)'s penalty criteria. See Luminant Generation Co. LLC v. United States EPA, 714 F.3d 841 (5th Cir. 2013), where the court upheld a state's authorization of the malfunction defense, as the defense criteria were tailored to ensure all reasonable efforts to comply with emission limitations and remain in compliance. Here, Colorado is refusing to implement a reasonableness standard in Schriever's draft permit.

Additionally, the Colorado Code of Regulations authorizes the affirmative defense of malfunction. 5 CCR 1001-2 indicates that

the affirmative defense does not apply to federally promulgated standards (such as NSPS and NESHAPS requirements). The Commission does not intend this provision to modify those federally promulgated standards or any exemptions for malfunction events that may apply under those standards. Additionally, *the Commission recognizes and intends that certain source permits may not currently adequately accommodate malfunctions as this new rule provides* (emphasis added). The Commission intends that the Division work with those specific sources to accommodate malfunctions into their permit limits, as appropriate.

In its written response to Schriever's 3 June 2020 comments, APCD stated it lacks the authority to alter the permit language regarding the malfunction defense without altering its SIP. As indicated above, APCD's assertion is incorrect under both federal and state law.

The current definitions of "malfunction" are contained at Appendix B of the draft permit. The definitions in the permit are as follows:

Malfunction (NSPS) means a sudden, infrequent, and not reasonably preventable failure of air pollution control equipment or unintended failure of a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operations are not malfunctions.

Malfunction (SIP) means any sudden and unavoidable failure of air pollution control equipment or process equipment or unintended failure of a process to operate in a normal or usual manner. Failures that are

primarily caused by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions.

Schriever requests the permit language from Section IV, Common provisions 3(d)(i), page 35, be expanded to add language that removes any ambiguity about enforcement against Schriever for process failures and malfunctions. Schriever proposes the language be amended as follows:

The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process (including integrated equipment and components and hardware and software both upstream and downstream) to operate in a normal or usual manner, beyond the reasonable control of the owner or operator;

III. Emergency Provisions & Exemptions

Emergency generators are covered by 40 CFR § 60.4211(f)(1) and 40 CFR § 63.6640(f)(1) which both state there is no time limit on the use of emergency stationary engines in emergency situations. As a result, the equipment can be included in the Title V permit, but APCD is not authorized to limit the emergency use of emergency generators. AQCC Regulation No. 3, 5 CCR 1001-5, states “emergency events such as accidental fires” are exempt from permit and operational limits. Yet, the APCD fails to acknowledge or apply the permit exemption. An emergency generator engine operating during an emergency should not be any different than an “emergency event” under Regulation No. 3. We are unaware of any state or federal statutory requirement to limit emissions during an emergency.

APCD, however, placed limits on the emissions resulting from an emergency by counting emergency emissions against the installation’s emissions threshold. Additionally, Regulation No. 3, 5 CCR 1001-5, Section V exempts Internal Combustion Engine (ICE) generators from permitting requirements, if they have uncontrolled actual emissions of less than five tons per year. Based on historical operations, all of Schriever’s emergency generators should be exempt from any annual permit limits and simply governed by NSPS and NESHAP operational, maintenance and emissions thresholds and standards. See Attachment 4.

Further, Under Section IV, Emergency Provisions Condition 5(a) page 39 of the draft permit, the permittee is required to identify the cause of emergencies. There are circumstances where the emergency’s root cause cannot be accurately and readily identified due to active efforts by an enemy to conceal or mask the cause.

The draft permit should clarify that emissions resulting from an emergency are exempt from emission limits. Emissions resulting from an emergency should not be counted against the installation’s emissions thresholds or trigger a New Source Review under Section IV, New Source Review Condition 12.

In its 3 June 2020 comments, Schriever proposed removing the requirement to identify the cause of an emergency if there is evidence that cause has been masked. Schriever also requested

the inclusion of an exemption from emissions during an emergency under the same logic as that under the malfunction provisions. See Attachment 2.

In its response to Schriever's comments, CDHPE once again stated it lacked the authority to amend the provision of the permit pertaining to emergency emissions. See Attachment 3. Schriever disagrees with APCD and requests the following language be implemented in the permit to clarify the definition of emergency:

In the event that the National Command Authority directs continuous operations of the permitted facility due to actual wartime conditions (e.g. a military or terrorist attack against the United States and/or its allies to prevent such an attack), the permitted equipment shall be authorized to operate as required to support the National Command authority. There shall be no limits on the operation of the equipment for the duration of the national emergency, as directed by the National Command authority. Upon termination of the National emergency, the permittee shall return to compliance with all terms of the permit.

IV. Testing Methods

Schriever requests the permit allow for the use of digital opacity monitoring, and specifically Alternative Method 082. 5 CCR 1001-1 allows "any alternate or equivalent method approved/and or specified by the Commission or the Division and approved by the US EPA." According to the US EPA website, Alternative Method 082 was approved by the EPA in 2012. See <https://www.epa.gov/emc/broadly-applicable-approved-alternative-test-methods>. On 8 May 2018, AFCEC issued a formal request to authorize Alternative Method 082 in lieu of Method 9 to comply with opacity monitoring limits. On 30 May 2018, APCD indicated that authorization of Alternative Methods 082 would require a rule change. Shortly thereafter, the APCD asked to drop the request so as not to delay issuance of the permit. In its 15 December 2020 response to Schriever's public comments, APCD indicated that Schriever would have to submit a complete permit modification application for the use of Alternative Method 082 to be approved. Schriever disagrees with this assertion. APCD has the authority to approve the use of Alternative Method 082 as part of the current permit negotiations, as the method is approved by 5 CCR 1001-1 and the US EPA has authorized it as a Broadly Applicable Standard that can be used in lieu of Method 9.

Expedient approval of Alternative Method 082 is important for Schriever's operations because the COVID-19 pandemic has ushered in a level of uncertainty with Method 9 observers renewing opacity certifications every six months. In contrast, Alternative Method 082 observers have lifetime certification, providing the equipment and analyst remain certified while the methodology has proven to be a simple, fast, reliable and repeatable means of opacity monitoring.

V. Limitation of Defenses

Schriever requests Section IV, Compliance Requirement Condition 4(b) page 38, be removed from the permit. This section limits available defenses in a way that is inconsistent with the legitimate uses of emergency and malfunction defenses. The section provides:

It shall not be a defense for a permittee in an enforcement action or a consideration in favor of a permittee in a permit termination, revocation, or modification action or action denying a permit renewal application that it would be necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

APCD stated it lacked the authority to remove this section of the permit, because the permit language was taken directly from AQCC Regulation No. 3, Part C, Section V.C.11., which classifies the language as a minimum requirement that must be included in the permit.

In the case of an emergency or malfunction, the Federal government would assert all defenses permitted under law, and should not be limited when seeking relief. Therefore, to avoid contradictions with the proposed amendments regarding emergency and malfunction defenses, this language should be removed from the permit.

VI. Fiscal Matters

As a federal agency, the Air Force is not permitted to pay late fees in accordance with 33 USC § 1301 et seq, 33 USC § 1323. Therefore, Schriever requested Section IV, Fee Payment Condition 8(a) be removed from the permit.

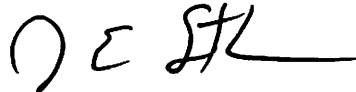
The section states, "A 1% per month late payment fee shall be assessed against any invoice amounts not paid in full on the 91st day after the date of the invoice."

APCD stated it lacked the authority to remove this clause from the permit, as the clause is derived from Colorado Revised Statutes Title 25, Section 25-7-114.7(2)(a)(I)(A.5). See Attachment 3. It is not reasonable, however, for APCD to include a requirement in the permit that it knows the federal government, by law, cannot adhere to. Therefore, this clause should be removed.

VII. Conclusion

For the foregoing reasons, the EPA should order APCD to revise operating permit 07OPEP300 to allow for the affirmative defenses of malfunction and emergency, to exercise exemptions for ICEs and emergency events, to approve the use of Alternative Method 082 for opacity observations, and to remove the requirement for Schriever to pay late fees. Such changes are necessary for APCD to comply with the requirements of the Clean Air Act and AQCC regulations. Of note, Schriever AFB was recently designated as a US Space Force base, and it is now referred to as Peterson-Schriever Garrison. This petition uses "Schriever AFB" to maintain naming uniformity with the draft permit and associated correspondence. The installation will complete a minor permit amendment to reflect the installation's name change. If you have questions about this petition please contact Mr. Monte McVay, Air Force Civil Engineering Center, at monte.mcvay@us.af.mil.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J E Smith", written over a horizontal line.

JAMES E. SMITH, Colonel, USAF
Commander

cc with Attachments:

Mr. Monte McVay, AFCEC/CZOM, monte.mcvay@us.af.mil
Mr. Matt Burgett, Permitting Program Manager, CDPHE, matt.burgett@state.co.us
Mr. Jason Ellis, Permit Engineer, APCD, Jason.Ellis@state.co.us

List of Attachments:

Attachment 1: Permit NO. 07OPEP300

Attachment 2: Public Comment Letter: Operating Permit 07OPEP300

**Attachment 3: APCD Response to Comments on Draft Initial Operating Permit
07OPEP300**

Attachment 4: Schriever Historical Actual Emergency Engine Emissions Profile